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In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 and EAST JEFFERSON HOSPITAL BOARD, PETITIONERS

v.

EDWIN G. HYDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ABBOTT B. LIPSKY, JR.
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

BARRY GROSSMAN
ROBERT B. NICHOLSON
ANDREA LIMMER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN H. CARLEY
General Counsel

DAVID A. GIACALONE
JUDITH A. MORELAND
Attorneys

Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether a contract for a single group of anesthesiologists to provide exclusive anesthesia services to a hospital is per se illegal under the Sherman Act as a "tie-in" of surgical and anesthesia services.

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INTEREST OF THE UNITED STATES

The United States and the Federal Trade Commission, which have primary responsibility for enforcement of the federal antitrust laws, have a substantial interest in assuring that the Sherman Act is construed in a manner that advances the Act's objective of protecting the nation's competitive economic system.

STATEMENT

1. Petitioner Jefferson Parish Hospital District No. 2 (District) owns East Jefferson District Hospital (East Jefferson or Hospital) (Pet. App. 20a). The Hospital is located in Metairie, Louisiana, a suburb of New Orleans. Prior to opening in 1971, the Hospital entered into a contract with Roux & Associates (Roux), a professional medical corporation, for Roux to be the exclusive

provider of anesthesia services for the Hospital. *Id.* at 22a. In 1976, the contract was renewed, and Roux continues to provide all anesthesia services at the Hospital. *Id.* at 23a.[1]

Respondent, Dr. Edwin Hyde, is a licensed and board certified anesthesiologist who chairs the anesthesiology department at Lakeside Hospital in New Orleans. *Id.* at 2a, 30a. When he applied for staff privileges at East Jefferson the Hospital's Credentials Committee recommended that Hyde be appointed to the staff, but the Board of Directors refused him privileges because of the exclusive contract with Roux. *Id.* at 25a-26a.

Hyde brought this antitrust suit in the United States District Court for the Eastern District of Louisiana, claiming that the Hospital had tied the use of the Roux's anesthesia services to purchase of the Hospital's surgical facilities and that this conduct violated Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 36a-37a.[2]

2. The district court dismissed the complaint. Although it assumed there was a "tie" of two separate services,[3] the district court rejected respondents' claim of per se illegality. First, the court held that the professions are not subject to the same per se rules applicable to other businesses. *Id.* at 37a, 40a. It also ruled that the tie was not illegal per se since the Hospital did not have dominant power in the market for surgical facilities, the tying product. *Id.* at 38a. This ruling rested on its finding that the geographic market in-

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[1] At Roux's request the contract language designating Roux as the exclusive provider of anesthesia services was deleted in 1976; the Hospital, however, has maintained its practice of relying exclusively on Roux for these services. Pet. App. 23a.

[2] Respondent also alleged violations of the Fourteenth Amendment and of state law. The district court dismissed those claims. Pet. App. 42a-47a. The court of appeals did not reach the issues (Pet. App. 5a n.3), and they are not before this Court.

[3] The only finding on this issue was that the anesthesia service appears as a separate item on the patient's bill. Pet. App. 33a.

cluded at least 20 other hospitals that provided the same surgical services. *Id.* at 34a. These hospitals serve the large majority of East Jefferson residents; indeed, 70% of patients who live in East Jefferson Parish go to hospitals other than East Jefferson. *Id.* at 33a. The court also found that traditional indicia of market power were lacking: the tying product was not unique; the Hospital's prices were no higher than its competitors' nor were its terms of supply more burdensome; and there was no indication that unwilling patients were coerced to take a product on unsatisfactory terms. *Id.* at 37a-38a.[4]

The district court therefore applied the rule of reason to petitioners' conduct and found it reasonable. It noted significant efficiencies that resulted from the exclusive contract with Roux: improved round-the-clock coverage, better control and standardization of procedures, and more efficient and less costly operation of the department.[5] And it concluded that, given the relevant market,

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[4] The district court found that most surgeons have privileges at more than one hospital; thus, they can take their patients to another hospital if they want to choose a particular anesthesiologist. Pet. App. at 34a. Patients have the same choice. *Ibid.*

The court also found that it is common practice in the health care industry for hospitals to enter into exclusive contracts with physicians engaged in certain hospital-based specialties, such as anesthesiology, radiology and pathology, to insure the availability of these services to their patients; and that, generally, a patient does not specifically select a particular specialist to perform these services. *Id.* at 32a. In the court's view, these factors increased the hospital's responsibility to provide quality service. *Ibid.*

[5] The court found that such a system lends flexibility to the scheduling of operations because it is not necessary to accommodate physicians with outside commitments; it permits the doctors, nurses, and technicians in the department to develop a work routine and a proficiency with the equipment; it increases the Hospital's ability to monitor performance because fewer individuals are involved; and maintenance of equipment is simplified and equipment breakdowns reduced by being limited to use by fewer doctors. Pet. App. at 32a-33a.

the benefits of the closed system outweighed any "minimal" foreclosure effects.

3. The court of appeals reversed. Pet. App. 1a-19a. It concluded that the Hospital's contract with Roux was illegal per se.[6] *Id.* at 14a-15a. In reaching this conclusion, the court stated that there was a "tie" of "two distinct services which a buyer should be able to obtain separately," *i.e.*, surgical services and anesthesia. *Id.* at 5a-6a. Next, the court rejected the district court's finding that the proper geographic market was East Jefferson Parish because, in its view, imperfections in the health market (due to third-party payors, and inability of patients to compare the quality of medical care) deprive consumers of the incentive to shop for quality or lower costs; consumers are therefore likely to select the hospital closest to their homes. *Id.* at 9a. The court thus found the relevant market to be the East Bank of Jefferson Parish, a market "much smaller than the district court found," and one in which the Hospital "ha[s] sufficient market power * * * to coerce purchase of the tied product." *Id.* at 10a. The court's finding of market power was based on the fact that one-third of the patients from the East Bank of East Jefferson go to the Hospital. *Ibid.*

Addressing the anticompetitive effects of the challenged practice,[7] the court acknowledged that the "tie-in" did not result in higher charges for anesthesia services. Pet. App. 11a. It found, however, that "it accomplished just as dramatic an effect by increasing the hospital's profit" by enabling the Hospital to "supplement[] a small contract group of anesthesiologists with a much larger group of lower priced [paraprofessional] anesthesists." *Id.* at 11a-

[6] The court held that per se rules under the Sherman Act are applicable to the health care industry as to other industries. Pet. App. at 14a-18a. See *Arizona* v. *Maricopa County Medical Society*, No. 80-419 (June 18, 1982).

[7] It was apparently not disputed that the practice involved a "not insubstantial" volume of interstate commerce, and the district court had so found. Pet. App. 32a.

12a. The court found that the contract produced "a number of anticompetitive effects": it prevents anesthesiologists from entering the portion of the market controlled by the Hospital; it indirectly limits the number of anesthesiologists in the area, and reduces the incentive for improving quality; and it limits the surgeon's or patient's choice of anesthesiologist. *Id.* at 12a. In addition, the court rejected the contention that competition still exists at the point where the contract for anesthesiology is awarded by the Hospital, because the Hospital "has not permitted this competition since the original contract was signed over ten years ago." *Id.* at 12a n.9. The court also rejected the Hospital's "business justifications" for the contracts because, in the court's view, the same objectives could be achieved through less restrictive alternatives. *Id.* at 14a.

DISCUSSION

The United States believes that this case is appropriate for review by this Court. By applying a per se rule of illegality to a common practice, the decision below conflicts with the decisions of every other court of appeals that has considered antitrust challenges to exclusive arrangements between hospitals and physicians. In our view, the court erred in regarding the anesthesia service contract as a tying agreement rather than as an exclusive dealing contract. This error merits correction for it creates a clear conflict between the Fifth Circuit and other courts of appeals. We believe, in addition, that the court of appeals' opinion is badly flawed in its analysis.

1. The court of appeals' decision conflicts with every other circuit court decision that has considered antitrust challenges to exclusive arrangements between hospitals and physicians. Each of the other courts has treated the challenged exclusive arrangement as a vertical restriction subject to the rule of reason.[8] Like the district court

[8] *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Capili* v. *Shott*, 620 F.2d 438 (4th Cir. 1980); *Harron* v. *United Hospital Center, Inc.*, 522 F.2d 1133 (4th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *Smith* v. *Northern Michi-*

here, these courts have found that such exclusive contracts do not necessarily have anticompetitive effects and have concluded that the particular arrangement at issue in each case did not unreasonably restrain trade. Moreover, some of the courts have specifically noted that exclusive contracts and similar arrangements may increase competition among hospitals and among physician groups. *Dos Santos, supra*, 684 F.2d at 1353-1354; *Robinson* v. *Magovern*, 521 F. Supp. 842, aff'd mem., 688 F.2d 824 (3d Cir. 1982), cert. denied, No. 82-415 (Nov. 1, 1982).

A general medical and surgical hospital, such as East Jefferson, holds itself out as having facilities and services available for general surgery and it competes for the business of patients who require such medical care. It must therefore provide the proper operating room and equipment, and must also assure that anesthesia services are available as needed. The hospital can assure the availability of such services in a number of ways, including "opening" its staff to any competent anesthesiologist, entering an exclusive contract with a particular group, or hiring anesthesiologists directly as employees. The East Jefferson Hospital decided to fulfill its obligation to have anesthesia services available by entering into the challenged exclusive contract with the Roux group. From this perspective, the contract is clearly a form of partial vertical integration analogous to requirements contracts, which are used by buyers to obtain an assured source of supply. It is apparent, therefore, that the arrangement is not a naked attempt to restrain trade warranting condemnation under a per se rule. Indeed, as recognized by the district court below and by the Seventh Circuit in *Dos Santos*, such contracts may enhance competition among hospitals and among anesthesiologists. See pages 10-12, 16, *infra*. Thus, the challenged practice should be judged under the

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gan Hospitals, Inc., 518 F. Supp. 644 (W.D. Mich. 1981), appeal pending, No. 81-1513 (6th Cir. argued Oct. 21, 1982). See also *Robinson* v. *Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd mem., 688 F.2d 824 (3d Cir. 1982), cert. denied, No. 82-415 (Nov. 1, 1982).

rule of reason, rather than a per se standard, because—like any requirements contract—it "may well be of economic advantage * * * to the consuming public." *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306 (1949).[9]

2. a. The court of appeals gave two reasons in support of its finding that a tying arrangement exists in this case: (1) users of the Hospital's operating rooms are "compelled to purchase the hospital's chosen anesthesia service"; and (2) "we are dealing with two distinct services which a buyer should be able to obtain separately." Pet. App. 5a-6a. Its cursory analysis, amounting to a "separability" test, led the court to ignore both the close functional relationship between the allegedly tied services, and the vertical integration achieved by the challenged contract. The court therefore mischaracterized the arrangement, and applied a per se test of illegality, in contrast to other courts (see note 8, *supra*) that have properly considered similar hospital practices to be exclusive dealing arrangements subject to the rule of reason.

As this Court made clear in the first case to present the "tie-in" characterization issue, the mere separability of combined products or services does not suffice for invocation of the tying doctrine. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). Looking beyond mere separability, the opinion in *Times-Picayune* assessed the nature and function of the allegedly tied products and the realities of the market. *Id.* at 613. It then compared the challenged practice with the "common core of the adjudicated unlawful tying [cases]"—"the forced purchase of a second distinct commodity * * * resulting in economic harm to competition in the 'tied' market." *Id.* at 614. Finding that "neither the rationale nor the doc-

[9] Like other types of vertical agreements, exclusive dealing contracts are illegal only if they have unreasonably anticompetitive effects that are not outweighed by their procompetitive effects. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), cert. denied, No. 82-396 (Nov. 8, 1982).

trines evolved by the 'tying' cases" were involved, the Court refused to dispose of the case under the tying rule; it held instead that the challenged practice must be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade." *Ibid.*

Likewise, most lower courts have looked beyond the separability of products sold as a package in deciding whether to treat an aggregation as a "tie"; they have instead looked to the seller's reasons for coupling the products and the policies underlying the tying rule as guides to characterization.[10] In contrast to the oversimplified approach adopted by the Fifth Circuit, the better reasoned opinions have "long recognized that the rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits." *Hirsh* v. *Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1348 (9th Cir. 1982), cert. denied, No. 82-570 (Nov. 1, 1982). As *Hirsh* and similar cases illustrate, a conclusion that an illegal tying arrangement exists cannot properly be reached without consideration of the purposes of the tying rule and the competitive function of the challenged aggregation of products. Because the Hospital's anesthesia contract combines functionally related services in an efficient form of vertical integration, it does not create a "forced purchase of a * * * distinct commodity" and may not cause "economic harm to competition in the 'tied' market." It therefore should not be characterized as a tying arrangement. *Times-Picayune, supra*, 345 U.S. at 614.

Rather than employing the wooden characterization of the Fifth Circuit, several courts of appeals have set out general principles and practical factors that are useful in

[10] See, *e.g.*, *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 (9th Cir. 1982); *Principe* v. *McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981); *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 47 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972); *Dehydrating Process Co.* v. *A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1969), aff'd per curiam, 365 U.S. 567 (1961).

determining "whether an aggregation of separable items should be regarded as one or more items for tie-in purposes." *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 48 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972). The key is the "function of the aggregation," *Principe* v. *McDonald's Corp.*, 631 F.2d 303, 308 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981); *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1352 (9th Cir. 1982), and the "relationship" between the alleged tying product (here, the hospital's operation rooms) and the alleged tied product (here, the hospital's chosen anesthesia service). *Id.* at 1353; *Hirsh* v. *Martindale-Hubbell, Inc.*, *supra*, 674 F.2d at 1347-1348. No matter how physically distinct and no matter who supplies them, combined products have not been deemed to be "tied" if their aggregation is an integral or important component of the seller's competitive strategy—if the combination reflects the defendant's strategy for competing on the merits. See, *e.g.*, *Principe*, *supra*, 631 F.2d at 309-311; *Krehl*, *supra*, 664 F.2d at 1353-1354.

Hirsh v. *Martindale-Hubbell, Inc.*, *supra*, and *Siegel* v. *Chicken Delight, Inc.*, *supra*, illustrate the appropriate analysis to employ in resolving characterization questions in tie-in cases. In *Hirsh*, the Ninth Circuit stated that it must consider "whether the aggregation serves to facilitate competition by promoting product quality or whether it, in fact, amounts to no more than a naked effort to impede competition on the merits." 674 F.2d at 1347. The court enunciated the following principle for characterizing an aggregation of products (*id.* at 1348):

> [W]here * * * the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller * * * no tying arrangement is present.

Under the *Hirsh* test, the challenged conduct does not constitute tying because it serves to enhance competition and efficiency in both of the vertically linked markets.

In *Siegel*, the Ninth Circuit posed three questions that help determine whether the aggregation is likely to aid or

hinder competition and whether the allegedly tied products should be deemed to be "distinct": (1) "whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any tie-in"; (2) "whether the items are normally sold or used as a unit with fixed proportions"; and (3) "whether the * * * items in the aggregation are to be regarded as distinct items which can be traded in distinct markets." 448 F.2d at 48. Under the *Siegel* criteria, the decision below is erroneous.

First, both the district court (Pet. App. 24a, 27a) and the court of appeals (*id.* at 11a-12a) found that the exclusive contract resulted in significant cost savings by facilitating the use of nurse-anesthetists to perform tasks that otherwise would be performed at greater expense by anesthesiologists. This suggests that the combination can enhance efficiency and competition.[11] Second, the allegedly tied products are indeed "normally used as a unit." [12] It is important for characterization purposes

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[11] The court of appeals erred in holding that such cost savings brought about an anticompetitive result merely by increasing the Hospital's profits (Pet. App. 11a-12a). Arrangements that increase efficiency and lower costs enhance consumer welfare, even if they also increase a firm's profits. It is, of course, the profit incentive that motivates firms to innovate and to reduce costs.

The court was also incorrect in implying that anesthesiologists require special protection from nurse-anesthetists, their "paraprofessional counterpart[s]" (Pet. App. 11a). To the contrary, the antitrust laws were promulgated to promote, not frustrate, the entry of competitive alternatives. The antitrust laws should not be transformed into a tool that allows competitors to prevent competition by competent, state-licensed, non-physician health care providers; their purpose, rather, is to assure that consumers will have such state-authorized alternatives available.

[12] It surely cannot be conclusive for characterization purposes that anesthesia facilities and services may be billed separately. In *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961), the court recognized that market factors may justify pricing components of an aggregation separately. Here, the vagaries of the health insurance system and the necessities of hospital accounting procedures

that it is a "normal" or common practice for hospitals to enter into exclusive contracts with physicians in certain specialties such as anesthesiology.[13] When an aggregation or combination of services is a common industry practice, it can be expected (absent evidence to the contrary) that the coupling serves some useful marketing or production purpose; and when many firms in an industry offer the same package of products, it can also be expected that economic power or leverage is probably not the force creating the aggregation.

Equally important in a tying analysis is the fact that hospital operating rooms and anesthesia services are traditionally, and indeed inescapably, "used as a unit with fixed proportions." Operating room patients expect—and strongly desire—to purchase anesthesia services along with the hospital room and the operation; there is no "forced purchase of a second distinct commodity," *Times-Picayune*, *supra*, 345 U.S. at 614, because the purchase of anesthesia services is neither "forced" nor "distinct".[14]

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explain separate billing. Similarly, it is not conclusive for characterization purposes that the anesthesia services are supplied by a different entity than the hospital. See *Krehl*, *supra*, 664 F.2d at 1353 n.14; *Kugler* v. *AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972). By definition, every instance of partial vertical integration will involve two separate entities; that fact alone cannot turn such integration into a tying arrangement. The relevant question from an antitrust perspective is whether the function of the aggregation is to create a better product and allow the seller to compete more effectively on the merits, not whether the packaged product is produced by one or more firms.

[13] The district court found such contracts to be a "common practice" (Pet. App. 32a), and there was evidence that a majority of hospitals in the New Orleans metropolitan area have similarly closed anesthesiology departments (Pet. App. 26a). In *Dos Santos*, the Seventh Circuit noted that such arrangements are "widespread" and have "been adopted by most hospitals in the Chicago area." 684 F.2d at 1351.

[14] Cf. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 17 (1958) (Harlan, J., dissenting) ("the inclusion of the tying clauses in contracts or leases might have been largely a matter of

Instead, anesthesia services are clearly "an ancillary and necessary part" of the total operation package. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 253-254 (4th Cir. 1971) ("*WGL*"). The patient does not want the operation without the anesthesia; the anesthesia *must* be supplied at the same time and place as the operation; the hospital *must* provide the equipment and facilities used by whoever performs the anesthesia services; and the hospital has the obligation to assure that quality anesthesia services are available as needed. In such a situation, a hospital may choose not to integrate the provision of anesthesia into the package of services, but the policies traditionally invoked in tying cases present no rationale for automatically preventing such integration. Since anesthesia is an indispensable part of the operation package, and since the Hospital does not require that the patient purchase more anesthesia than necessary, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969), operating rooms and anesthesia services "may be fairly treated by a seller as inseparable," *A.O. Smith*, *supra*, 292 F.2d at 655, and the rationale involved in the tying cases is inapplicable.

As the above discussion indicates, operating rooms and anesthesia services simply cannot be "regarded as distinct items which can be traded in distinct markets." *Siegel*, *supra*, 448 F.2d at 48. There is no separate consumer demand for anesthesia services—the demand for the two products is complementary; their markets are interdependent, not distinct. Therefore, as the Fourth Circuit said in *WGL*, *supra*, 438 F.2d at 253, where it concluded that there was no separate market for the installation of underground wiring as distinct from the market for electricity, "[t]hat there are not dual markets strongly suggests there are not separate products."

2. b. Beyond its mischaracterization of the Hospital's exclusive contract as a tying arrangement, the court of appeals used an incorrect analysis in holding that the Hos-

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indifference to at least many of the purchasers or lessees of appellants' land * * *").

pital has sufficient power in the tying market to warrant per se condemnation. The court of appeals not only failed to identify the kinds of "advantages" that would indicate the Hospital has the requisite market power, *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977) ("*Fortner II*"), it has also ignored this Court's admonition that "the whole and not part of a relevant market must be assigned controlling weight" when testing the strength of a firm's tying "lever." *Times-Picayune, supra*, 345 U.S. at 611.

The court of appeals recognized that under a "traditional method of economic power analysis" the respondent "has failed to prove an illegal tying arrangement" (Pet. App. 8a). It nonetheless concluded that the Hospital has sufficient power to warrant automatic condemnation as a tie-in, because it believed that patients "select the hospital closest to home" and prefer a "non-profit entity" (Pet. App. 9a)and that the proper geographic market therefore consists solely of the East Bank of Jefferson Parish. While the proximity and profit status of a hospital may be taken into account by many patients, neither factor has been shown to be of such overwhelming importance as to convey to a hospital the requisite "advantage" over its competitors.[15]

Other courts have correctly applied the "traditional" method of economic analysis rejected by the Fifth Circuit

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[15] The court of appeals' finding of "sufficient market power" based on the Hospital's 30% market share (Pet. App. 10a), without examination of the degree of competitive advantage reflected by that market share, defeats any rational aim of using "economic power" to gauge the likelihood of anticompetitive effects. As this Court has noted, "no magic inheres in numbers; 'the relative effect of percentage command of a market varies with the setting in which that factor is placed.'" *Times-Picayune Publishing Co.* v. *United States, supra*, 345 U.S. at 612, quoting, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948). But the decision below does not indicate that the Hospital possessed either market dominance or any distinct advantage over its competitors for offering a unique or differentiated product. See *Fortner II, supra*, 429 U.S. at 620-621.

(Pet. App. 8a) when defining a hospital's geographic market. As this Court did in *Tampa Electric, supra*, 365 U.S. at 331-333, the better reasoned decisions have attempted to "identify the area of effective competition that the defendant encounters when it offers the designated product for sale." *Magovern, supra*, 521 F. Supp. at 878; see also *United States* v. *Hospital Affiliates International, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,721, at 77,852-77,853 (E.D. La. 1980). Had the correct market definition test been employed in this case, the more likely conclusion would have been that the geographic market extends beyond the Parish line and that East Jefferson Hospital lacks significant market power or any material advantages not shared by its competitors. As the court of appeals recognized, the contract at issue here "involved only one hospital out of at least twenty" in a geographic area that also includes New Orleans (Pet. App. 8a, 33a). Furthermore, patients and surgeons have—and frequently exercise (*ibid.*)—the "right to go to another hospital if they are at all dissatisfied with the anesthesia service offered at East Jefferson Hospital" (*id.* at 8a).

3. The court of appeals' wooden characterization of the contract as a "tie-in" and its erroneous market definitions led the court automatically to apply the per se proscription of *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958), to what is essentially an exclusive dealing arrangement. This is not merely erroneous as a matter of law, it is ill-advised as a matter of public policy. Sellers throughout our economy offer aggregations of parts, products and services that *can* be sold separately, but that sometimes may be supplied more efficiently and conveniently when packaged together. Indeed, quality innovations and cost break-throughs often consist of new combinations of products or services that previously were sold separately. It is therefore imperative that antitrust courts continue to distinguish aggregations that promote consumer welfare and competition

through increased efficiency and quality from those that injure competition and coerce consumers.

The difference between the Fifth Circuit's analysis and that employed by all other courts that have considered the question underscores the need to recognize that the principles underlying the prohibition of pernicious tie-ins —those with anticompetitive effects—do not require the mechanical application of a per se rule to all conduct that could conceivably be labeled a "tie-in" of two products. Other courts have correctly treated such arrangements as vertical restrictions subject to scrutiny under the rule of reason. See note 8, *supra;* cf. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Like the district court in this case, these courts have found that such exclusive contracts do not necessarily have anticompetitive effects and have concluded that the particular conduct at issue did not unreasonably restrain trade. Moreover, some of the courts have specifically noted that exclusive contracts and similar arrangements may increase competition among hospitals and among physicians. *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center, supra*, 684 F.2d at 1353-1354; *Robinson* v. *Magovern, supra*, 521 F. Supp. at 919; see *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306 (1949).

While some arrangements that link the sales of two products or services may, of course, have anticompetitive effects, see, *e.g., Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953), this is not to say that such effects need be assumed or that the combined sales of two products in one package will never have procompetitive (or potentially procompetitive) uses. Indeed, the possibility that the conduct at issue here would increase competition is amply demonstrated by the facts, and, more generally, such salutary effects have been recognized by the courts and legal commentators.

The district court found that the Hospital's contract with Roux may enhance competition among hospitals and

among anesthesiologists. See also *Dos Santos, supra*. Hospitals with exclusive contracts may be able to offer better services at lower prices and, therefore, compete more effectively for patients and physician referrals. For example, both courts below recognized (Pet. App. 11a-12a, 32a) that the contract allowed the Hospital to utilize the services of nurse-anesthetists more fully, thus lowering costs. Similarly, groups of anesthesiologists may compete for an exclusive contract (either to obtain it originally, or to keep it) by offering high quality, efficient services. Such rivalry may be more vigorous in that event than it would under the "open staff" system favored by respondent and required by the court of appeals. The system may provide greater efficiency to the Hospital, which, in this economic setting, may have a greater incentive to reduce costs than do "consumers", *i.e.*, patients, most of whom are covered by insurance and often do not discuss—or pay—medical fees.

Such efficiencies and procompetitive effects serve not only to emphasize the particular errors in the decision below, but also to illustrate the inherent risks of a rule that automatically condemns sales arrangements as illegal simply because a court employs the pejorative "tie-in" label to conduct without regard to such efficiencies and benefits. In light of the growing awareness among the courts and the commentators that not all conduct that by some stretch of the imagination could be called a "tie-in" should be presumptively banned, a standard more faithful to the principles underlying *International Salt* and *Fortner II* would recognize that such potentially procompetitive arrangements should not automatically be deemed illegal.

The legal literature and the cases have come to note the procompetitive potential of purported tie-ins. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 514 n.9 (White, J., dissenting) ("the fact that tie-ins are not entirely unmitigated evils should be borne in mind"), P. Areeda, *Antitrust Analysis* 571 (2d ed.

1974); Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 29 (1957). In his dissenting opinion in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, *supra*, 394 U.S. at 514 n.9, Justice White observed that:

> Tie-ins may also at times be beneficial to the economy. * * * They may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330 (1962); Note, Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives, 18 Stan. L. Rev. 457 (1966). They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. Compare *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 138-140 (1936), and *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306 (1949), with *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F.2d 641 (C.A. 7th Cir. 1935), aff'd, 299 U.S. 3 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution. * * *

Illustrations abound to demonstrate potential benefits similar to those Justice White noted. For example, no one would seriously contend that the sale of a right shoe with the sale of a left shoe is an illegal "tie-in." This is because the cost efficiencies in such a sale are implicitly acknowledged. R. Bork, *The Antitrust Paradox* 378-379 (1978); see also Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50, 71-72 (1958) (proper product definition is "not bounded by the minimum product that could or is typically sold, but rather bounds at the point where the amalgamation appears to have little economic justification"); E. Singer,

Antitrust Economics and Legal Analysis 106 (1981) ("Economies of production through tying arrangements include almost all assembled products. A radio, for example, is theoretically a tying arrangement of semiconductors and resistors. However, the functional necessity for all parts excludes the radio from the tying arrangements nomenclature.").

In appropriate circumstances, one recognized justification for such arrangements is to protect the seller's goodwill by assuring that the tying product is used with essential complements that do not impair the product's quality or performance. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 559 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); see also *Pick Manufacturing Co.* v. *General Motors Corp.*, 80 F.2d 641, 643 (7th Cir. 1935), aff'd per curiam, 299 U.S. 3 (1936). Moreover, it has been suggested that such packaged sales may be used to meter intensity of demand for the tying good through a complementary "tied" item (*e.g.*, a stapling machine and staples), so the seller can price the "tying" product in direct proportion to its use. See O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 11-13 (1975); R. Bork, *The Antitrust Paradox*, *supra*, at 375-376. Cf. *IBM* v. *United States*, 298 U.S. 131 (1936); *International Salt Co.* v. *United States*, *supra*; *Henry* v. *A.B. Dick Co.*, 224 U.S. 1 (1912). This can increase output of the "tying" product.

In light of some of these potential procompetitive functions, the courts have applied the per se standard to alleged tie-ins in a manner that takes into account the competitive effects of the conduct at issue. Thus, as discussed above, a sale must be found to involve two separate and distinct products or services before it will automatically be condemned. *Times-Picayune Publishing Co.* v. *United States*, *supra*, 345 U.S. at 614. When sensitively applied, this one-product/two-product distinction can serve to avoid automatic proscription of efficient sales arrangements. See Baker, *The Supreme Court and the*

Per Se Tying Rule: Cutting the Gordian Knot, 66 Va. L. Rev. 1235, 1315 (1980).[16]

Courts have also used the other pre-conditions of a tie-in—that the seller have sufficient economic power in the market for the tying product and that a "not insubstantial" amount of commerce in the tied market be affected—to avoid the mechanical condemnation of sales arrangements whose purpose and effect are not likely to be anticompetitive. See *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Warner Management Consultants, Inc.* v. *Data General Corp.*, 545 F. Supp. 956, 965-966 (N.D. Ill. 1982); *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 806-821 (N.D. Cal. 1981); *JBL Enterprises, Inc.* v. *Jhirmack Enterprises, Inc.*, 509 F. Supp. 357, 377-378 (N.D. Cal. 1981); *Refrigeration Engineering Corp.* v. *Frick Co.*, 370 F. Supp. 702, 711-712 (W.D. Tex. 1974).

In contrast to the better-reasoned decisions of courts that have recognized that economic efficiencies may be achieved through purported tie-ins, the court below

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[16] For example, in *United States* v. *Jerrold Electronic Corp.*, *supra*, 187 F. Supp. at 559-560, the court accepted "a sound business reason" (*i.e.*, the need to launch and develop a new experimental business using sensitive and unstable equipment) as a legal justification for treating the sale of a package of various items of equipment designed for community antenna systems as the sale of a "single product." Accord, *Dehydrating Process Co.* v. *A.O. Smith Corp.*, 292 F.2d 653, 655-656 (1st Cir.), cert. denied, 368 U.S. 931 (1961) ("sound business interests of seller" warranted treatment of components as "inseparable"); *Foster* v. *Maryland State Savings & Loan Ass'n*, 590 F.2d 928, 932 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979) ("Incidental services purchased by the seller * * * for legitimate business reasons cannot be viewed as a separate (or tied) product, merely because the buyer is charged for them"); see also *Hirsh* v. *Martindale-Hubbell, Inc.*, *supra*, 674 F.2d at 1347 (sale is a "single" product where the aggregation serves to facilitate competition by promoting product quality); cf. *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 48 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972) (package may be single product where the amalgamation results in cost savings apart from reduction in sales expenses and the like, or where the items are normally sold or used in fixed proportions).

eschewed any such analysis and instead found it "clear that we are dealing with two distinct services which a buyer should be able to obtain separately." Pet. App. 5a-6a. The court's failure even to consider the possible efficiencies and advantages to the Hospital and consumers[17] serves to emphasize the inherent problems of a wooden application of the per se rule.[18] While we are troubled by the court of appeals' failure to appreciate the potential efficiencies of the conduct at issue, we do not suggest that the appropriate legal standard requires comprehensive inquiry in every case into all the potential benefits of a combination sale or that if a practice did not produce efficiencies in a particular case it should be condemned as per se unlawful. On the contrary, the quality of analysis is likely to be improved and clearer guidance provided if analysis is focused on the limited

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[17] While the court of appeals did discuss what it viewed as anticompetitive aspects of the contract arrangement (Pet. App. 12a-13a), this discussion was directly keyed to its erroneously restrictive market definition and therefore failed to address the anticompetitive impact issues in the proper context.

[18] The error of this approach was exacerbated by the court's invocation of a "less restrictive" alternative standard (Pet. App. 13a-14a). While the clear availability of such alternatives may be a relevant factor in determining the existence of either anticompetitive intent or effect (see *White Motor Co.* v. *United States*, 372 U.S. 253, 270-272 (1963) (Brennan, J., concurring); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980)), the existence of such an alternative does not in itself prove that the means selected were either unreasonable or anticompetitive. The rule employed by the court below would, in the words of the Third Circuit (*American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (1975)), make firms "guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests." See *Newberry* v. *Washington Post Co.*, 438 F. Supp. 470, 474-476 (D.D.C. 1977); cf. *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

number of factors that are most significant to predicting the likely competitive effects of practices that may be viewed as tie-ins. The court of appeals, unfortunately, did not do this.

In sum, the decision below is far afield from the principles that led this Court to describe pernicious arrangements under the Sherman Act in *International Salt*, *Times-Picayune*, and *Fortner II*. We believe, therefore, that this case presents an appropriate opportunity for this Court to confirm the validity of the many judicial decisions that—unlike the decision below—have recognized that economic reality can offer valuable insight in the analysis of alleged tie-ins.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ABBOTT B. LIPSKY, JR.
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

JOHN H. CARLEY
General Counsel

BARRY GROSSMAN
ROBERT B. NICHOLSON
ANDREA LIMMER
Attorneys

DAVID A. GIACALONE
JUDITH A. MORELAND
Attorneys

Federal Trade Commission

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